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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1309

THE KRESGE FOUNDATION, a Michigan corporation,
Petitioner,

vs.

LOUIS SCHLESINGER COMPANY,
a corporation of New Jersey,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	9
APPENDIX:	
A—Opinion of the United States Court of Appeals for the Third Circuit	1a
B—Judgment of the United States Court of Appeals for the Third Circuit	9a
C—Opinion of the United States District Court for the District of New Jersey	10a
D—Opinion of Wortendyke, D. J., Denying 1964 Motion to Dismiss, etc.	27a

Cases Cited

Dunn v. Printing Corp. of America, 245 F. Supp. 875 (E. D. Penn. 1965)	6
Hisel v. Chrysler Corporation, 90 F. Supp. 655 (W. D. Mo. 1950)	7
Republic of China v. Pong-Tsu Mow, 33 N. J. Super. 24, 108 A. 2d 891 (Law Div. 1954)	7, 8

PAGE

Rorick v. Devon Syndicate, 307 U. S. 299, 59 S. Ct. 877, 83 L. Ed. 1303 (1939) 6, 8

Schuster v. Schuster, 9 N. J. Super. 11, 86 A. 2d 676 (App. Div. 1950) 7

Stanley Trading Co. v. Bensdorp, Inc., 95 F. Supp. 502 (D. Mass. 1950) 7

Tanko v. Saperstein, 149 F. Supp. 317 (N. D. Ill. 1957) 7

Statute Cited

28 U.S.C. (Judicial Code):

Sec. 1254 (1) 2

Sec. 1450 3

Rule Cited

Federal Rules of Civil Procedure:

4(e) 6

64 2

Text Cited

Annotation:

74 A. L. R. 912 (1931) 7

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The Kresge Foundation, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on January 12, 1968.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, entered January 12, 1968, is reported 388 F. 2d 208. It is reproduced in Appendix A of this Petition.

The opinion of the United States District Court for the District of New Jersey, filed December 10, 1964, denying petitioner's motion to dismiss the action or quash the writ of attachment, is reported at 236 F. Supp. 373. The opinion of said District Court granting summary judgment in favor of petitioner, filed November 22, 1966, is reported at 260 F. Supp. 763.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 12, 1968 (Appendix A. *infra*). The jurisdiction of this Court is invoked under 28 U.S. Code §1254 (1).

Questions Presented

1. Whether a defendant's challenge to the jurisdiction of a Federal Court should not be considered and determined before rendering a decision adverse to the defendant.

2. Whether a Federal Court's jurisdiction in an attachment action, acquired by removal from a state court, survives the filing of an amended complaint setting forth a new cause of action, where no additional process has been served.

Statutes Involved

Rule 64 of the Federal Rules of Civil Procedure, dealing with attachment actions removed from a state court, provides as follows:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in

which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Section 1450 of the Judicial Code, 28 U. S. Code §1450, provides as follows:

"Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual nowithstanding such removal.

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

Statement of the Case

This case originated with the issuance of an order for attachment by the Superior Court of New Jersey on September 15, 1964, purportedly affecting certain New Jersey property of petitioner, The Kresge Foundation, a Michigan charitable corporation (hereafter referred to as "Kresge"). Said writ of attachment was obtained by respondent, Louis Schlesinger Company, a New Jersey corporation (hereafter referred to as "Broker"), by presenting to the court a complaint verified by affidavit dated September 11, 1964. This complaint and affidavit were subsequently filed (K. 346b to K. 359b).*

The substance of Broker's complaint was that Kresge had contracted with Broker on or about December 12, 1956 to pay a commission for Broker's services in procuring a tenant, Western Electric Company, for Kresge's New Jersey property, and that part of that contract was an agreement to pay additional commissions on any renewal or extension of the original lease. Broker alleged, by affidavit dated September 11, 1964, that Kresge had leased additional space to Western Electric Company, and that Broker was entitled to additional commissions therefor (K. 346b to K. 359b).

Kresge had never agreed to pay such additional commissions, but on or about June 9, 1964, it had in fact renegotiated its lease with Western Electric Company. This new lease covered three additional floors of the building, as well as the premises previously leased (K. 444b to K. 467b). However, Kresge and Western Electric Company, by mutual agreement, terminated this new lease, and in its place adopted a third lease, executed September 14,

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* "K" refers to Kresge's "Appendix to Appellee's Brief" part of the record certified to this Court by the Court of Appeals. "B" refers to Broker's "Appendix to Appellant's Brief", part of the same record.

1964, and dated June 9, 1964, covering the same premises, but wholly differing in the conditions, rental payments, and otherwise (B. 86a to B. 111a; K. 470b).

Kresge was never served with process in New Jersey, but received notice of the proceedings by mail. On October 7, 1964, Kresge petitioned for removal of the attachment suit to the United States District Court for the District of New Jersey on diversity jurisdiction. On October 13, 1964, Kresge moved to dismiss the action, and to quash the Writ of Attachment, on grounds that the original complaint and verifying affidavit had been defective, had failed to state a claim, and had therefore failed to invoke the jurisdiction of the New Jersey (and hence Federal) Court. This motion was denied, and the opinion denying it appears at 236 F. Supp. 373 (B. 1a to B. 2a).

However, on December 9, 1964, prior to the court's decision on this motion, Broker filed an amended complaint. The substance of this second complaint was that Kresge had not only leased additional space to Western Electric Company, but had also renewed the original lease for a longer term. This new complaint was based upon the September 14, 1964, lease, which had not been in existence when the affidavit to the original complaint was executed (B. 2a; B. 8a to B. 12a).

On February 21, 1966, Broker moved for summary judgment against Kresge. Kresge filed a cross-motion for summary judgment on April 1, 1966. These motions were heard together on June 24, 1966, and decided by opinion filed November 22, 1966 (reported at 260 F. Supp. 763), granting Kresge's motion and denying that of Broker (B. 6a to B. 7a).

Broker appealed to the United States Court of Appeals for the Third Circuit, which reversed the judgment of the

District Court and remanded for further proceedings. From this judgment entered January 12, 1968, the petitioner requested certification.

Reasons for Granting the Writ

The extent of Federal jurisdiction in attachment actions has not been considered by this Court since *Rorick* v. *Devon Syndicate,* 307 U. S. 299, 59 S. Ct. 877, 83 L. Ed. 1303 (1939); nevertheless it remains an important federal question which needs to be decided, especially since the 1963 amendment to Rule 4(e) (Fed. R. Civ. P.) creating original Federal jurisdiction in attachment.

Originally there was no Federal jurisdiction in attachment actions, except in actions under certain Federal statutes, and cases removed from the state courts. Now under Rule 4(e) (Fed. R. Civ. P.) an attachment suit may be begun in the Federal courts; however, as was held in the *Rorick* case, Federal jurisdiction depends upon local law. The Federal courts may attach what a state court might attach, and must dissolve the attachment if a state court would have done so. See *Dunn* v. *Printing Corp. of America,* 245 F. Supp. 875 (E.D. Penn. 1965).

The New Jersey Courts have held that attachment actions may not be amended to state a new cause of action, nor substantially to increase the damages claimed. Kresge argued that Broker's action should therefore be dismissed. The Court of Appeals, by its failure to decide this jurisdictional issue, has, by its silence, said in effect that Kresge could be compelled to defend any amended claim the Broker might raise, in whatever amount, so long as the original attachment substantially complied with local law.

It is well-settled under common law principles that a plaintiff in attachment who amends his complaint to state a new cause of action thereby releases the sure-

ties on any attachment bond, dissolves the attachment and defeats the jurisdiction of the court. See the extensive annotation on this point at 74 A. L. R. 912 (1931).

This rule applies equally to the Federal courts. In *Stanley Trading Co.* v. *Bensdorp, Inc.*, 95 F. Supp. 502 (D. Mass. 1950), the court held that the effect of amending a complaint would have to be determined by state law. If state law holds that the amendment states a new cause of action, then the Federal court would have to dissolve the attachment. See also *Hisel* v. *Chrysler Corporation*, 90 F. Supp. 655 (W. D. Mo. 1950) and *Tanko* v. *Saperstein*, 149 F. Supp. 317 (N. D. Ill. 1957).

New Jersey law is fairly represented by *Republic of China* v. *Pong-Tsu Mow*, 33 N. J. Super. 24, 108 A. 2d 891 (Law Div. 1954), in which a complaint in attachment was deemed not amendable to add a new count on a foreign judgment arising out of the same transactions set forth in the original complaint. The court held that such an action on a judgment is a separate, new and distinct action, and, in any case, the new damages demanded were $5,000,000 as opposed to $800,000 in the original affidavit in attachment. The court held that a complaint substantially increasing the damages, by itself, stated a new cause of action, and that a defendant who had appeared to defend an attachment suit for the lesser amount, could not be compelled to defend against the larger claim instead. See also *Schuster* v. *Schuster*, 9 N. J. Super. 11, 86 A. 2d 676 (App. Div. 1950).

In the present case, Broker amended its complaint to seek commissions on a different lease that did not even exist when it executed its original attachment affidavit. The commissions sought under the amended complaint were nearly double the amount which might have been

due under the first 1964 lease. The amended complaint also omitted one defendant, originally named as a joint debtor, and added a new claim for commissions on renewal of the 1957 lease (Compare K. 346b to K. 349b with B. 8a to B. 12a).

Kresge appeared for the limited purpose of defending its property against the claim set forth in the original complaint. It should not be compelled to defend against a claim that is twice as large, based on subsequent events.

In *Rorick* v. *Devon Syndicate,* 307 U. S. 299, 59 S. Ct. 877, 83 L. Ed. 1303 (1939) this Court considered an attachment action begun in the Ohio courts and removed to the Federal courts. Five years later the plaintiff filed an amended petition and obtained supplemental writs of garnishment, based on the same cause of action, against additional property of the defendant in Ohio. This Court held that Federal courts could issue such writs if Ohio courts could do so, and remanded for determination whether Ohio allowed it or not.

Even though Federal attachment jurisdiction depends upon State law, there has never been any determination in this case as to what New Jersey law will allow with respect to the amended complaint. The *Republic of China* case, *supra,* indicates that any substantial increase in damages is not permitted through amendment in attachment; nevertheless Broker here doubled the damages claimed, without additional process, and without jurisdiction *in personam,* and Kresge is expected to defend, and perhaps pay, this claim.

The District Court and Circuit Court both failed to decide this question of jurisdiction, although Kresge has raised it at every stage of the proceedings. By their

silence the Federal courts have permitted Broker to assert a new cause of action against Kresge, even though Kresge was never subject to the personal jurisdiction of the state or Federal courts. By their silence, the Federal courts have permitted Broker to begin a new action without service of process, and without the issuance of a new writ of attachment, in a manner that does not comply with state or Federal law.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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